Nov 2nd 1874. 20-571 Bullard

C. J.

# TRANSCRIPT OF RECORD.

## SUPREME COURT OF THE UNITED STATES.

No. ~~322.~~ 49

WARREN C. GILLETTE, PLAINTIFF IN ERROR,

vs.

MASSENA BULLARD.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF MONTANA.

FILED DECEMBER 4, 1872.

OCT 7 1874

# SUPREME COURT OF THE UNITED STATES.

## No. 322.

WARREN C. GILLETTE, PLAINTIFF IN ERROR,

vs.

MASSENA BULLARD.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF MONTANA.

INDEX.


| | Original. | Print. |
|---|---|---|
| Complaint | 1 | 1 |
| Answer | 6 | 3 |
| Motion for judgment | 8 | 4 |
| Order for judgment | 9 | 4 |
| Exception of defendant | 9 | 4 |
| Judgment | 9 | 5 |
| Notice of appeal | 10 | 5 |
| Undertaking on appeal | 11 | 6 |
| District clerk's certificate | 13 | 6 |
| Cause entered in supreme court | 14 | 7 |
| Appellant's brief | 14 | 7 |
| Respondent's brief | 15 | 7 |
| Appellant's brief | 17 | 8 |
| Judgment on appeal | 27 | 12 |
| Opinion | 28 | 13 |
| Undertaking on appeal | 33 | 15 |
| Writ of error | 35 | 16 |
| Citation | 38 | 16 |
| Clerk's certificate | 39 | 17 |

1 In the district court, third judicial district, in and for the county of Lewis and Clarke, Montana Territory.

MASSENA BULLARD, TRUSTEE,
*vs.*
WARREN C. GILLETTE. } Transcript on appeal.

Be it remembered, that among the proceedings, records, and pleadings had, made, and filed in the above-entitled cause herein, are the following, to wit:

On the thirtieth day of January, A. D. 1872, the plaintiff filed herein his bill of complaint, which is in words and figures following, to wit:

THE TERRITORY OF MONTANA,
*County of Lewis and Clarke:*

Third judicial district court.

MASSENA BULLARD, TRUSTEE, &c.,
*against*
WARREN C. GILLETTE.

*Complaint.*

The plaintiff, Massena Bullard, trustee of an express trust, as hereinafter set forth, complains of the defendant, Warren C. Gillette, for that, heretofore, to wit, on the 15th day of June, A. D. 1868, one Charles W. Marden, by the judgment and consideration of this court, did recover a judgment in his favor and against George Plaistead and R. R. Wheelock, in due form of law, in the sum ($3,250.00) three thou-
2 sand two hundred and fifty dollars damages, and three hundred and fifty-four dollars and seventy cents, ($354 $\frac{70}{100}$,) his costs of suit in that behalf expended, which said judgment bears interest from the date aforesaid; which said judgment was duly given, and yet remains of record in said court in full force, unreversed and wholly unsatisfied, except as is hereinafter stated. And afterwards, to wit, on the 16th day of July, 1868, the same defendants in said action, to wit, the said Plaistead and Wheelock, did appeal from said judgment so by this court rendered as aforesaid to the supreme court of the Territory of Montana, and on such appeal the defendant, Warren C. Gillette, (signing said undertaking with the initials of his christian name, as follows: W. C. Gillette,) with one William Nowlan, did then and there, at the special instance and request of said Plaistead and Wheelock, in consideration of the premises and of said appeal, execute and deliver their certain undertaking on said appeal in writing, which was then and there filed with the clerk of this court for the use and benefit of said Charles W. Marden and his assigns, wherein and whereby the said Gillette and Nowlan, for the consideration aforesaid, did severally undertake and promise and acknowledge themselves severally bound in the sum of six thousand five hundred dollars, that if the said judg-
3 ment of said district court so appealed from, or any part thereof, should be affirmed, the said Plaistead and Wheelock should pay the amount directed to be paid thereby, or the part of such amount as to which the same should be affirmed, if affirmed only in part, and all damages and costs which should be awarded against said appellants

upon the appeal; and, thereafter, such proceedings was had in said action on such appeal in the supreme court aforesaid, that by the judgment and consideration of said supreme court, which was duly given on the 31st day of December, 1868, that being one of the days of the December term, A. D. 1868, of said supreme court, the said judgment was wholly affirmed. And the said Marden did recover his costs in said supreme court in that behalf expended, taxed at ($27.00) twenty-seven dollars, against said Plaistead and Wheelock, appellants, which judgment for costs remains wholly unpaid.

And plaintiff further says that, by executions issued to Deer Lodge County, there was made, on the twenty-second day of August, 1870, over and above the sheriff's fees thereon, the sum of ($557.25) five hundred and fifty-seven dollars and twenty-five cents; and on the 26th day of September, A. D. 1870, the further sum of ($121.75) one hundred and twenty one dollars and seventy-five cents, over and above the fees of service of said execution, and no more. And though the time
4 limited in that behalf hath long since expired, yet the said Plaistead and Wheelock, appellants, have not, nor have either of them, or any persons in their behalf, paid the costs of said Marden so as aforesaid recovered in said supreme court on said appeal, nor the amount directed to be paid by said judgment recovered in said district court; but there now remains due on said judgment of said district court the sum of four thousand two hundred and twenty-nine dollars and thirty-eight cents, of which sum three thousand six hundred and four dollars draw interest at the rate of ten per cent. per annum. And the plaintiff further says that, on the 28th day of September, 1869, the said Charles W. Marden did sell, and in writing did assign, the judgment aforesaid, with his interest in the undertaking aforesaid, and all moneys due and to become due thereon, to one A. S. Hill; and the said A. S. Hill thereafter, on the date last aforesaid, did sell, assign, and in writing transfer the same to one Mary H. Marden, wife of said Charles W. Marden; and thereafter, to wit, on the 2nd day of July, 1870, the said Mary H. Marden and Charles W. Marden, being indebted to one Alexander M. Woolfolk, they, the said Charles W. Marden and Mary H. Marden, did then in writing sell, assign, and transfer the same to this plaintiff, expressly in trust, however, to secure the indebtedness of the said Alexander M. Woolfolk aforementioned, and to pay the
5 ballance to the said Mary H. Marden, and for that purpose to sue for and recover and receive the moneys due and to become due on said judgment and undertaking, which said assignment this plaintiff did accept, and now has and holds for the uses and purposes aforementioned. And the plaintiff says that, by reason of the premises, there is due to this plaintiff, trustee as aforesaid, the sum of ($4,264.68) four thousand two hundred and sixty-four and sixty-eight cents, with interest on $3,604.70 from the day of the filing hereof, at the rate of ten per cent. per annum, from the said defendant, Warren C. Gillette, on his said undertaking, for which plaintiff prays judgment and for his costs.

WARREN & SANDERS,
*Att'ys for Plaintiff.*

THE TERRITORY OF MONTANA,
*County of Lewis and Clarke:*

Massena Bullard, being first duly sworn on his oath, says he has good reason to believe, and does believe, that the matters and things as stated

in the foregoing complaint are true, and that he is said trustee and plaintiff in this action. And further saith not.

MASSENA BULLARD.

Subscribed and sworn to before me this 30th day of January, 1872.

ALEX. H. BEATTIE,
*Deputy Clerk.*

And on the 21st day of February, A. D. 1872, the defendant filed his answer to said complaint, which is in the words and figures following, to wit:

In district court, third judicial district, county of Lewis and Clarke, Territory of Montana.

MASSENA BULLARD, TRUSTEE, &C., PLAINTIFF,
*vs.*
WARREN C. GILLETTE, DEFENDANT.

And now comes the above-named defendant, by his attorneys, Chumasero & Chadwick, and, for answer to the complaint of the plaintiffs herein, avers that on the day of January, A. D. 1869, the said George Plaistead and R. R. Wheelock, the defendants wherein the judgment was rendered and the undertaking mentioned in the said complaint was given, appealed from the judgment rendered in the supreme court of the said Territory to the Supreme Court of the United States; and that the said defendants Plaistead and Wheelock thereupon executed and filed with the clerk of the supreme court of the said Territory a good and sufficient bond on appeal, in double the amount of the judgment and costs in the action above named, and providing for the payment of all costs and damages in the said Supreme Court of the United States, and thereupon the said supreme court of the said Territory staid all proceedings upon the judgment in that court rendered and granted a supersedeas in said action. That no remittitur or mandate has ever been issued in the said action of Marden against Plaistead and Wheelock from the said Supreme Court of the United States to the said supreme court of the said Territory; and that no remittitur or mandate from the said supreme court of the said Territory has ever been issued to the district court above named in said action. And that the said judgment so rendered in the supreme court of the said Territory still remains in that court so staid by the order thereof by the giving of the said bond on appeal and by the said supersedeas. Defendant avers that the said district court, by reason of the facts above stated, has no jurisdiction of the action first above entitled, or of any of the matters and things stated in the said complaint.

Wherefore the defendant prays that the said action be dismissed, and he have judgment for his costs of action.

CHUMASERO & CHADWICK,
*Def't's Attorneys.*

TERRITORY OF MONTANA,
*County of Lewis and Clarke, ss:*

Warren C. Gillette, being first duly sworn, deposes and says that he is the defendant named in the foregoing answer; that he has heard the

answer read, and knows the contents thereof; that he has reason to believe, and does believe, the matters as therein stated to be true.

WARREN C. GILLETTE.

Subscribed and sworn to before me this 20th day of July, 1872.

W. F. CHADWICK, *Notary Public.*

8 Received a copy of the within answer this 21st day of February, 1872.

W. F. SANDERS,
*Plaintiff's Attorney.*

And on the 25th day of March, A. D. 1872, the plaintiff filed his motion for judgment, which is in the words and figures following, to wit:

THE TERRITORY OF MONTANA,
*Lewis & Clarke County:*

3rd judicial district court.

MASSENA BULLARD, TRUSTEE, &C.,
*vs.*
WARREN C. GILLETTE.

*Motion.*

Massena Bullard, trustee, plaintiff, comes and moves the court here, upon the complaint and answer, to give a judgment in his favor, and against Warren C. Gillette, defendant, as prayed in plaintiff's complaint, for the reasons following:

1st. Because upon such complaint and answer the plaintiff is entitled to such judgment.

2nd. Because said answer sets up no defense to plaintiff's cause of action.

3rd. Because this court has jurisdiction of the person of the defendant, and of the cause of action set forth in plaintiff's complaint.

W. F. SANDERS, *Att'y for Pl'ff.*

Rec. copy March 25th, 1872.

CHUMASERO & CHADWICK,
*Def't's Att'ys.*

9 On the 30th day of March, A. D. 1872, this cause came on to be heard upon the plaintiff's motion for judgment. Whereupon the court made an order for judgment, which is in the words and figures as follows, to wit:

Ordered that said motion be sustained, and that judgment be entered herein in favor of the said plaintiff, and against the said defendant, in the sum of four thousand three hundred and twenty-five dollars and sixteen cents, ($4,325.16,) and costs of suit.

To which ruling and the making of which order the defendants then and there duly excepted.

Thereupon judgment was duly entered, of which the following is a copy, to wit:

In the district court, third judicial district, Lewis and Clarke County, Montana Territory.

MASSENA BULLARD, TRUSTEE,
*vs.*
WARREN C. GILLETTE.

*Judgment by court.*

This cause came on to be heard upon plaintiff's motion for judgment upon the complaint and answer on file herein. After the argument of counsel the cause was submitted to the court for consideration and decision, and after due deliberation therein the court ordered that the said motion for judgment be sustained, and that judgment be entered in accordance therewith. Wherefore, by reason of the law and the order aforesaid, it is ordered and adjudged that Massena Bullard, trus-
10 tee, &c., the plaintiff, do have and recover of and from Warren C. Gillette, the defendant, the sum of four thousand three hundred and twenty-five dollars and sixteen cents, with interest thereon at the rate of ten per cent. per annum from date hereof until paid, together with said plaintiff's costs, and disbursements incurred in this action, amounting to the sum of twenty-four dollars and fifty cents, ($24.50.)

Judgment rendered March 30th, A. D. 1872.

And on the 9th day of April, A. D. 1872, the defendant filed his notice of appeal, which is in the words and figures following, to wit:

*Notice of appeal.*

In the district court of the third judicial district of the Territory of Montana.

MASSENA BULLARD, TRUSTEE, &C., PLAINTIFF,
*vs.*
WARREN C. GILLETTE, DEFENDANT.

You will please take notice that the defendant in the above-entitled action hereby appeals to the supreme court of this Territory from the judgment therein made and entered in the said district court on the 30th day of March, A. D. 1872, in favor of the plaintiff in said action, and against said defendant, and from the whole thereof.

Dated this 9th day of April, A. D. 1872.

Yours, &c.,

11 CHUMASERO & CHADWICK,
*Attorneys for Defendant.*

To the clerk of said district court, and to W. F. Sanders, attorney for plaintiff.

A copy of the within notice of appeal received this 9th day of April, A. D. 1872.

MASSENA BULLARD.

And on the 9th day of April, A. D. 1872, the defendant filed his undertaking on appeal, which is in the words and figures following, to wit:

*Undertaking on appeal.*

In the district court of the third judicial district of the Territory of Montana, in and for the county of Lewis and Clarke.

MASSENA BULLARD, TRUSTEE & PLAINTIFF,
*against*
WARREN C. GILLETTE, DEFENDANT.

Whereas the defendant in the above-entitled action has appealed to the supreme court of the Territory of Montana from a judgment entered against him in said action in the said district court, in favor of the plaintiff in said action, on the 30th day of March, A. D. 1872, for four thousand three hundred and twenty-five and $\frac{16}{100}$ dollars damages, and twenty-four and $\frac{50}{100}$ dollars costs of suit, and from the whole and every part of the said judgment:

Now therefore, in consideration of the premises and of such ap-
12 peal, we, the undersigned, George Higgins, of the county of Lewis and Clarke, by occupation a merchant, and C. A. Broadwater, of the same place, freighter, do hereby jointly and severally undertake and promise, on the part of the appellant, that the said appellant will pay all damages and costs which may be awarded against him on the appeal, not exceeding three hundred dollars, to which amount we acknowledge ourselves jointly and severally bound. And whereas the appellant is desirous of staying the execution of the judgment so appealed from, we do further, in consideration thereof and of the premises, jointly and severally undertake and promise, and do acknowledge ourselves further jointly and severally bound in the further sum of eight thousand six hundred and fifty and $\frac{32}{100}$ dollars, being double the amount named in the said judgment appealed from, that if the said judgment appealed from, or any part thereof, be affirmed, the appellant shall pay the amount directed to be paid thereby on the part of such amount as to which the same shall be affirmed, if affirmed only in part, and all damages and costs which shall be warranted against the appellant upon the appeal.

Dated the 9th day of April, A. D. 1872.

C. A. BROADWATER. [SEAL.]
GEORGE HIGGINS. [SEAL.]

TERRITORY OF MONTANA,
*County of Lewis & Clarke, ss:*

13 George Higgins and C. A. Broadwater, the persons named in and who subscribed the foregoing undertaking as the sureties thereto, being severally duly sworn, each for himself, says: that he is worth the amounts specified in said undertaking as the penalty thereof, over and above all his just debts and liabilities, exclusive of property exempt from execution.

C. A. BROADWATER.
GEORGE HIGGINS.

Subscribed & sworn to before me this 9th day of April, A. D. 1872.
W. F. CHADWICK,
*Notary Public.*

TERRITORY OF MONTANA,
*County of Lewis and Clarke:*

I, H.P. Wade, clerk of the district court, third judicial district, in and for the county aforesaid, do hereby certify that the foregoing 20 pages,

numbered from 1 to 20, contain a full, true, and correct transcript of certain proceedings, orders, and pleadings had, made, and filed in said district court in the cause of Massena Bullard, trustee, &c., vs. Warren C. Gillette.

Witness my hand and the seal of said district court this 16th day of July, 1872.

[SEAL.]

H. P. WADE, *Clerk*,
By ALEX. H. BEATTIE,
*Deputy Clerk.*

14 In the supreme court of the Territory of Montana, Aug. term, 1872.

Be it remembered that on the 12th day of August, A. D. 1872, the cause entitled "Massena Bullard, trustee, &c., respondent, vs. Warren Gillette, defendant and appellant," was duly filed and entered for hearing in the office of the clerk of said supreme court, on appeal from the judgment and order entered herein, in the 3rd judicial district court, sitting in and for the county of Lewis and Clarke in said Territory.

And afterwards, to wit, on the 13th day of August, A. D. 1872, the said defendant and appellant, by his attorneys, Messrs. Chumasero and Chadwick, filed herein his brief, points, and authorities, of which in words and figures the following is a copy, to wit:

*Points and authorities of counsel for appellants.*

Supreme court of Montana Territory, August term, A. D. 1872.

MASSENA BULLARD, RESPONDENT,
*vs.*
WARREN C. GILLETTE, APPELLANT.

The court erred in entering judgment, notwithstanding answer of appellants; such answer constituted a defence to said action. (See organic act, sec. 9; judiciary act of 1789; Brightley's Dig., page 257, 8.)

15 CHUMASERO & CHADWICK,
*Appellant's Attorneys.*

Filed Aug. 13, 1872.

I. R. ALDEN, *Clerk.*

And afterwards, to wit, on the 17th day of August, A. D. 1872, the said Massena Bullard, plaintiff and respondent, by his attorney, W. F. Sanders, esq'r, filed herein his points and authorities, of which, in words and figures, the following is a copy, to wit:

*Brief of respondent.*

MASSENA BULLARD, TRUSTEE,
*vs.*
WARREN C. GILLETTE.

The undertaking sued on is an agreement to pay money on the happening of a specified contingency, and is to be interpreted by the same

rules of law as a bond with a condition. Thus interpreted the only question is, has the contingency happened? for if it has, then the agreement to pay has become absolute. Nothing of the complaint was denied by the answer; it comes under that class of answers which confess and seek to avoid; it confesses all and avoids nothing. The defendant admits, notwithstanding the pretended appeal to the United States Supreme Court, that the judgment is in full force, unreversed. (See complaint not denied.) A further appeal is no defense. The lia-
16 bility of defendant is all his bond, and it is the measure of his liability; (see Caldwell et al. vs. Ganz & Kline, 1st vol. Montana reports.) It does not stipulate that he shall not pay if there is a further appeal at all. Further appeal is no defense; (see 8 Abbott, 234; do., 70; 1st Boswell, 637.)

But if further appeal was a defense, enough is not set up to constitute a defense. It is necessary that such a defense be complete, and hence it should have been alleged that said appeal was yet pending on the case reversed. Remedy on judgment and on bond are independent remedies. (6 Gray, 141.)

W. F. SANDERS,
*For Plaintiff.*

Filed Aug. 17th, 1872.

I. R. ALDEN, *Clerk.*

And afterwards, to wit, on the 17th day of August, A. D. 1872, the said appellant and defendant, W. C. Gillette, by his attorneys, Chumasero & Chadwick, filed herein his additional brief, points, and authorities, of which, in words and figures, the following is a copy, to wit:

*Points & authorities on behalf of the appellant.*

In supreme court, Territory of Montana, August term, A. D. 1872.

MASSENA BULLARD, RESPONDENT,
*vs.*
WARREN C. GILLETTE, APPELLANT.

17 This action was commenced by the filing of a complaint which states briefly that one Charles W. Warden recovered a judgment against one Plaistead and one Wheelock for the sum of $3,250.00, besides costs of suit; that on the 16th day of July, 1868, the said defendants appealed to the supreme court of said Territory, and the said Plaistead & Wheelock, upon such appeal, filed with the clerk of the court an undertaking signed by the defendant, Warren C. Gillette, and one William Nowlan, such undertaking having been executed under the 333d section of our Practice act of 1867, and for the purpose of staying the collection of the said judgment; that, on the 31st day of December, A. D. 1868, the aforesaid judgment was affirmed in the said supreme court; that the said judgment, costs, and interest thereon remains due and unpaid, except certain small amounts collected, leaving a ballance due at the time of filing the complaint the sum of $4,264.60; that the said plaintiff, in said action, and respondent here, held the said undertaking as trustee of an express trust by assignment. The said defendant came in and answered, admitting all matters averred in the complaint, and setting up affirmatively, that, after the rendition of the judgment of affirmance in the supreme court of the said Territory, the said Plaistead and Marden appealed from such judgment to the Supreme Court

of the United States, and that upon such appeal they filed with the clerk of the said territorial supreme court a good and sufficient bond on appeal in double the amount of the judgment and costs in the
18 action above named, and providing for the payment of all costs and damages in the said Supreme Court of the United States; and thereupon the said supreme court of the said Territory stayed all proceedings upon the judgment in that court rendered, and granted a supersedeas in said action.

The answer further avers that no remittitur or mandate has ever been issued in the said action by the Supreme Court of the United States to the supreme court of the said Territory, and that no remittitur or mandate has ever been issued by the said supreme court of the said Territory to the district court where the said action was tried and judgment entered; and that the said judgment so rendered in the supreme court of the said Territory still remains in that court, so stayed by the order thereof by the giving of the said bond on appeal, and by the said supersedeas; and said answer alleges that the district court had no jurisdiction of the subject-matter of the said action.

That, after the filing of said answer, the said respondent moved for judgment upon the pleadings. The motion came on for a hearing before the 3rd judicial district court of Lewis and Clarke County on the 30th day of March, A. D. 1872, and the court ordered judgment to be entered for the plaintiff for the amount above named and interest. Such judgment was entered, and therefrom this appeal is taken to this court. The appellant contends that the said Plaistead and Wheelock, having taken their appeal from the judgment rendered in the
19 supreme court of the Territory on the 31st day of December, A. D. 1868, and having obtained, by the filing of their bond, a supersedeas and stay of all farther proceedings until the determination of such appeal, that no action could be commenced on the undertaking on appeal from the district court to the supreme court until the appeal from the supreme court of the Territory to the Supreme Court of the United States had been finally determined, and not alone determined, but a mandate transmitted from the Supreme Court of the United States to the supreme court of the Territory.

The question whether or not this appeal had, in fact, been disposed of and the same dismissed, or a judgment rendered, has nothing to do with the one before the court. The motion for judgment was made upon the pleadings. Such motion thereby conceding that all of the allegations of complaint and answer were true, but assuming that the matters contained in the answer were true, but constituted no defence. Such answer avers that upon filing of the bond on appeal in the territorial supreme court, that court granted a supersedeas, and ordered all proceedings under said judgment to be stayed until the determination of the appeal to the Supreme Court of the United States. Said answer states farther that no mandate was ever sent by the United States Supreme Court to the territorial supreme court. These facts are all admitted to be true by the motion. The question may be asked,
20 what give the right of action to the respondent upon the undertaking sued upon? The answer must be the affirmance of the judgment of district court by the supreme court of the Territory. But, in this case, it is admitted that the court rendering such judgment of affirmance ordered all proceedings to be stayed, and granted a supersedeas. Then how could the respondent or his assignor, Marden, bring suit upon such undertaking until the determination of the case in the appellate court, and not alone determined, but until the legal evidence of

such determination had been filed with the clerk of the supreme court of the Territory? Such legal evidence could only be the mandate of the court to which such appeal was taken—the Supreme Court of the United States. Then, under the pleadings and the motion, admitting the truth thereof, there can be but one question which must determine this case, namely, where an appeal is taken from a district court to the supreme court of the Territory of Montana from a money judgment, and an undertaking given under 333rd section of practice act, and such judgment affirmed by the said supreme court, and from such judgment of affirmance on appeal is taken or writ of error sued out, as the case may be, and a bond filed and a supersedeas granted, does this stay all proceedings until the determination of the appeal in the Supreme Court of the United States, or can the respondent immediately commence
21 an action on the undertaking given in the district court, and collect the judgment appealed from the sureties? It seems to us this can admit of but one answer, and that is, that he cannot. If it be otherwise, then how is the appellant aided by the remedy given him by the organic act and the laws of Congress—the judiciary act of 1789? If, after he obtains his supersdeas on the appeal from the supreme court of the Territory to the Supreme Court of the United States, the respondent can proceed and collect the judgment by suing on the undertaking, instead of doing it directly by suing out an execution on the judgment, how does the supersedeas protect or aid him? The respondent may collect the money on the undertaking given in the court below, and the appellant prosecute his appeal in the United States Supreme Court, reverse the judgment, and what is his remedy? Must he then sue respondent to recover it back? The respondent may have become insolvent, or may have moved to a foreign land, and the appellant is remediless. Such a proposition strikes us as being without the support of common sense or a legal principle. To illustrate the workings of such a rule as contained in the decision rendered in the above action in the district court, let us apply it to a case which was tried in 3rd judi-
cial district of this Territory—judgment rendered for the plaintiff
22 for about $42,000.00; and an appeal was taken to the supreme court of the Territory, and an undertaking given under the said 333rd section of the practice act. The judgment of the court below was affirmed, and from such judgment of affirmance an appeal was taken to the Supreme Court of the United States, and a supersedeas granted upon filing an undertaking or bond in about the sum of $84,000.00. We refer to the case of Kleinschmidt et al. vs. Dunphy et al. Now if the decision rendered in the case under consideration in the court below upon the motion for a judgment was correct, then immediately upon such affirmance of Kleinschmidt case in the supreme court of the Territory, the plaintiff could have commenced an action upon the undertaking given in the district court, recovered judgment, collected the $42,000.00, pocketed the money, and left Montana; and the subsequent reversal of the case in the Supreme Court of the United States would have been an empty triumph. We scarcely think the supreme court of the Territory of Montana will hold this to be the law. Our organic act provides that "writs of error and appeals from the final decisions of said supreme court (territorial) shall be allowed, and may be taken to the Supreme Court of the United States in the same manner and under
the same regulations as from the circuit courts of the United
23 States, where the value of the property or the amount in controversy, to be ascertained by the oath or affirmation of either party, or other competent witnesses, shall exceed one thousand dollars."—Sec-

tion 9 of organic act. Section 2nd of the judiciary act of 1789 provides how final judgment and decrees made and rendered in the district courts of the United States may be reviewed in the circuit courts, and how the decisions of the circuit court may be reviewed in the Supreme Court of the United States, (Brightley's Digest, page 257;) and section 3rd of said act (Brightley's Digest, page 258) provides for the supersedeas, and that it shall stay execution; and if the judgment or decree be affirmed, then for damages to the respondent; and section 4 provides for the entry of judgment in district courts in conformity with the judgment rendered in the circuit courts, and in the circuit courts in conformity with the judgment of the Supreme Court of the United States.

Our organic act makes this statute applicable to writs of error and appeals from our supreme court, our district courts standing in the relative place of the district courts of the United States, and our supreme court in that of the circuit courts. Now we hardly believe that any lawyer will contend that, in a case where an appeal has been taken from a district court of the United States to the circuit court, and a
24 bond given, and a supersedeas granted, and the judgment of the court below affirmed, and from such judgment of affirmance an appeal has been taken to the Supreme Court of the United States, and a supersedeas granted, that, before a mandate comes from the Supreme Court to the circuit court, a suit may be maintained on the bond in the district court. We assert, without fear of contradiction, that it never has been done, and never will be, by any respectable attorney. But if this action can be maintained, and this judgment stand as law, then there is no reason why it could not be, for the cases are parallel, and governed by the same principles and the same statute, that of 1789. Counsel for respondent contended in the court below that the action of the court below in ordering judgment herein was supported by the decisions of the courts of New York, and, in support of such position, cited two cases that were referred to in Abbott's New York Digest. The cases were not before the district court, only the brief reference found in the Digest. Before examination of those cases, it will be found that they do not aid respondent's counsel in the least. In the first place, it must be remembered that the New York code providing for appeals in that State is very different from the judiciary act of 1789. It provides for appeals from special terms to general terms of the supreme court, and then from the general term to the court of appeals. It provides for a stay of proceedings by an undertaking similar to that
25 named in section 333rd of our practice act. But an appeal may be taken in any and all cases by giving a simple undertaking in the sum of $250.00. The cases referred to in Abbott's Digest in support of the syllabus are reported in Abbott's Practice Reports, vols. 6th, page 70, & volume 8th, 234. The latter seems to have been based upon the former, and relies upon it as its authority. And this decision was rendered by one justice of the superior court of the city of New York, without referring to any authorities in support of the position assumed; and even this decision in no manner supports the judgment rendered in this action. It seems, from the statement of the case, that the appeal was taken from a judgment rendered at a special term of the said superior court to the general term of the same court, and gave an undertaking, the same in form and sued upon in this action. Subsequently to the filing of the undertaking all of the defendants abandoned the appeal, and neglected to further prosecute the same, except one, and the judgment of the court below was finally affirmed. We learn from the opinion of Judge Pierrepont, who was one of the judges of the superior

court, that the "action on the undertaking was commenced some two months before the appeal was taken to the court of appeals of the State. Therefore at the time of the commencement of the action there was no stay of proceedings, and the cause of action was complete; and that, if such appeal constitutes a defence, it has arrisen subsequent to the commencement of the action," to use the language of the learned
26 judge who rendered the decision. We would ask the court to look at the statement of this decision in Abbott's Digest, and then at the decision itself. If the judgment in this action was rendered upon any authority to be found in any of the books, it was upon this decision as given in the Digest; and, by reference to the decision itself, we find that it wholly fails to support the position of respondent's counsel. We are satisfied that no decision can be found which will support the summary rendition of this judgment, and that the case must be reversed.

We do not know that it is necessary, or that it will make any difference, to allude to the great importance, as a question of practice, of the one involved in this case. If the right of action existed in this case, and this judgment was properly entered, notwithstanding the answer, then the right to maintain an action upon every undertaking on appeal under the 333rd section of practice act, upon being affirmed in the supreme court, will exist notwithstanding an appeal to the Supreme Court of the United States, and a supersedeas granted—a right we should dislike to concede until established by the determination of the highest tribunal of the land. But if the decision of the lower court should be affirmed by this court, and an appeal should be taken, a writ of error sued out, and a supersedeas granted notwithstanding this, while we are awaiting the decision of the Supreme Court of the United States, another action may be commenced and prosecuted on the undertak-
27 ing that brought this cause before this court tribunal. And thus works this beautiful theory of the counsel for respondents.

It may be urged by the attorney for the respondent that the answer, to constitute a defence, should have alleged that the case of Marden vs. Wheelock and Plaistead was then pending in Supreme Court of the United States, and thus abandon position taken in court below. If this is so, we only have this to state, that, if the foregoing extracts from said answer be true, then the only method known to the law to entitle respondent to sue would be to obtain the mandate from the said Supreme Court of the United States, and file it in the supreme court of this Territory.

CHUMASERO & CHADWICK,
*Appellant's Attorneys.*

Filed August 17, 1872.

I. R. ALDEN, *Clerk.*

And afterwards, to wit, on the 18th day of August, 1872, the said cause was duly submitted to the court on the foregoing written arguments, and the same taken under consideration by the court.

And afterwards, to wit, on the 19th day of August, A. D. 1872, that being one of the days of the said August term of said supreme court, the said cause coming on for judgment and decision on the appeal herein, it is considered, adjudged, and determined here by the court that
28 the judgment herein of the court below be affirmed, with costs; which is entered of record accordingly.

And afterwards, to wit, on the same day, the *the* justices of said supreme court filed herein their opinion in writing, of which, in words and figures, the following is a copy, to wit:

In the supreme court of the Territory of Montana, August term thereof, A. D. 1872.

MASSENA BULLARD, TRUSTEE, &C., RESPONDENT,
*vs.*
WARREN C. GILLETTE, APPELLANT.

*Opinion of the court, by Murphy, asso. justice.*

This is an action brought by the plaintiff, as trustee of an express trust, against the defendant as one of the sureties on an undertaking on appeal for the recovery of the ballance due on a judgment rendered by the district court of the 3rd judicial district, in the case of Charles W. Marden against George Plaistead and R. R. Wheelock. From that judgment the defendants took an appeal to the supreme court of the Territory, for which the defendants in this action executed the undertaking sued upon. On the hearing in the appellate court, at the December term, 1868, the judgment below was affirmed, and a further appeal taken to the Supreme Court of the United States. In January last the present suit on the undertaking was instituted; and in March last the case was heard upon plaintiff's motion for judgment upon the pleadings, on the ground that the answer set up no defence to the cause of action. The motion was sustained, and judgment rendered accordingly in favor of plaintiff for four thousand three hundred and twenty-five and $\frac{16}{100}$ dollars, ($4,325.16,) to which defendant excepted, and has appealed to this court. And the only question for our consideration is whether or not the answer is a valid defence. The complaint, among other things, alleges the execution, delivery, and filing of said undertaking, wherein and whereby the said Gillette and Nowlan, for the consideration aforesaid, did severally undertake and promise and acknowledge themselves severally bound in the sum of six thousand five hundred dollars, that, if the said judgment of said district court so appealed from, or any part thereof, should be affirmed, the said Plaistead and Wheelock should pay the amount directed to be paid thereby, or the part of such amount as to which the same should be affirmed, if affirmed only in part, and all damages and costs which should be awarded against said appellant upon the appeal.

And it also alleges the affirmance of the judgment of the court below by the appellate court at the December term, 1868, and that the same yet remains of record in said court, in full force, unreversed and wholly unsatisfied, "except as to the amount of six hundred and seventy-nine dollars ($679.00) collected by execution and credited upon it." And it further alleges the sale, assignment, and transfer in writing by said Marden of "the judgment aforesaid, with his interest in the undertaking aforesaid, and all moneys due or to become due thereon," to one Hill, from him to Charles W. Marden and wife, and from them to the plaintiff, expressly in trust to secure an indebtedness from them to one Woolfolk, and the acceptance and holding of said last-named assignment by said plaintiff in trust as aforesaid. The answer does not deny these allegations, but sets up in defense the following facts, to wit:

court, that the "action on the undertaking was commenced some two months before the appeal was taken to the court of appeals of the State. Therefore at the time of the commencement of the action there was no stay of proceedings, and the cause of action was complete; and that, if such appeal constitutes a defence, it has arrisen subsequent to the commencement of the action," to use the language of the learned
26 judge who rendered the decision. We would ask the court to look at the statement of this decision in Abbott's Digest, and then at the decision itself. If the judgment in this action was rendered upon any authority to be found in any of the books, it was upon this decision as given in the Digest; and, by reference to the decision itself, we find that it wholly fails to support the position of respondent's counsel. We are satisfied that no decision can be found which will support the summary rendition of this judgment, and that the case must be reversed.

We do not know that it is necessary, or that it will make any difference, to allude to the great importance, as a question of practice, of the one involved in this case. If the right of action existed in this case, and this judgment was properly entered, notwithstanding the answer, then the right to maintain an action upon every undertaking on appeal under the 333rd section of practice act, upon being affirmed in the supreme court, will exist notwithstanding an appeal to the Supreme Court of the United States, and a supersedeas granted—a right we should dislike to concede until established by the determination of the highest tribunal of the land. But if the decision of the lower court should be affirmed by this court, and an appeal should be taken, a writ of error sued out, and a supersedeas granted notwithstanding this, while we are awaiting the decision of the Supreme Court of the United States, another action may be commenced and prosecuted on the undertak-
27 ing that brought this cause before this court tribunal. And thus works this beautiful theory of the counsel for respondents.

It may be urged by the attorney for the respondent that the answer, to constitute a defence, should have alleged that the case of Marden vs. Wheelock and Plaistead was then pending in Supreme Court of the United States, and thus abandon position taken in court below. If this is so, we only have this to state, that, if the foregoing extracts from said answer be true, then the only method known to the law to entitle respondent to sue would be to obtain the mandate from the said Supreme Court of the United States, and file it in the supreme court of this Territory.

CHUMASERO & CHADWICK,
*Appellant's Attorneys.*

Filed August 17, 1872.

I. R. ALDEN, *Clerk.*

And afterwards, to wit, on the 18th day of August, 1872, the said cause was duly submitted to the court on the foregoing written arguments, and the same taken under consideration by the court.

And afterwards, to wit, on the 19th day of August, A. D. 1872, that being one of the days of the said August term of said supreme court, the said cause coming on for judgment and decision on the appeal herein, it is considered, adjudged, and determined here by the court that
28 the judgment herein of the court below be affirmed, with costs; which is entered of record accordingly.

And afterwards, to wit, on the same day, the *the* justices of said supreme court filed herein their opinion in writing, of which, in words and figures, the following is a copy, to wit:

In the supreme court of the Territory of Montana, August term thereof, A. D. 1872.

MASSENA BULLARD, TRUSTEE, &C., RESPONDENT,
*vs.*
WARREN C. GILLETTE, APPELLANT.

*Opinion of the court, by Murphy, asso. justice.*

This is an action brought by the plaintiff, as trustee of an express trust, against the defendant as one of the sureties on an undertaking on appeal for the recovery of the ballance due on a judgment rendered by the district court of the 3rd judicial district, in the case of Charles W. Marden against George Plaistead and R. R. Wheelock. From that judgment the defendants took an appeal to the supreme court of the Territory, for which the defendants in this action executed the undertaking sued upon. On the hearing in the appellate court, at the December term, 1868, the judgment below was affirmed, and a further appeal taken to the Supreme Court of the United States. In January last the present suit on the undertaking was instituted; and in March last the case was heard upon plaintiff's motion for judgment upon the pleadings, on the ground that the answer set up no defence to the cause of action. The motion was sustained, and judgment rendered accordingly in favor of plaintiff for four thousand three hundred and twenty-five and $\frac{16}{100}$ dollars, ($4,325.16,) to which defendant excepted, and has appealed to this court. And the only question for our consideration is whether or not the answer is a valid defence. The complaint, among other things, alleges the execution, delivery, and filing of said undertaking, wherein and whereby the said Gillette and Nowlan, for the consideration aforesaid, did severally undertake and promise and acknowledge themselves severally bound in the sum of six thousand five hundred dollars, that, if the said judgment of said district court so appealed from, or any part thereof, should be affirmed, the said Plaistead and Wheelock should pay the amount directed to be paid thereby, or the part of such amount as to which the same should be affirmed, if affirmed only in part, and all damages and costs which should be awarded against said appellant upon the appeal.

And it also alleges the affirmance of the judgment of the court below by the appellate court at the December term, 1868, and that the same yet remains of record in said court, in full force, unreversed and wholly unsatisfied, "except as to the amount of six hundred and seventy-nine dollars ($679.00) collected by execution and credited upon it." And it further alleges the sale, assignment, and transfer in writing by said Marden of "the judgment aforesaid, with his interest in the undertaking aforesaid, and all moneys due or to become due thereon," to one Hill, from him to Charles W. Marden and wife, and from them to the plaintiff, expressly in trust to secure an indebtedness from them to one Woolfolk, and the acceptance and holding of said last-named assignment by said plaintiff in trust as aforesaid. The answer does not deny these allegations, but sets up in defense the following facts, to wit:

1st. The appeal of Plaistead and Wheelock from the judgment of the supreme court of the territory to the Supreme Court of the United States.

2nd. The execution of a proper bond on said appeal.

3rd. The stay of proceedings on said judgment, and the granting of a supersedeas by the first appellate court.

4th. The issuance of no mandate or remittitur from the last to the first appellate court, nor from that to the said district court.

5th. The remaining of said judgment in this court, stayed by the order of the court, by the bond on appeal, and by the supersedeas, and the want of jurisdiction of said district court. Now do these facts constitute a sufficient defence or bar to the action?

31 As will appear from what has already been shown, the answer, by failing to deny under our system of pleading, for the purposes of the action, thereby admits all the material allegations of the complaint and upon which the cause of action is founded, but seeks to avoid or destroy their legal effect by interposing and setting up another and different state of facts. It purports to be a confession and avoidance, or in the nature of such, yet, while it confesses everything necessary to a recovery, does it in fact avoid anything?

Notwithstanding the averment of appeal to the Supreme Court of the United States, it admits the judgment for the payment of which the undertaking was entered into, to be still "in full force and unreversed." And although it avers that no mandate or remittitur has been issued to the courts below, yet it fails to allege that said appeal is still pending, or that the case has been reversed. If a further appeal is a defence at all it must be a complete defense, and every fact necessary to make it such must be averred. But can it be a sufficient defense in this case? The defendant must stand or fall by the bond he has voluntarily executed. The obligation to pay grows out of the terms of the undertaking itself, and it alone must be the measure of the defendant's liability. It is nowhere agreed that in case of a further appeal he shall not pay, nor does it show, or can it be inferred, that any such thing was ever contemplated, or, if so, was in any way intended to affect the obligation.

32 From an examination of the undertaking as recited by the complaint it is found to be an express agreement to pay money on the happening of a particular event therein specified. The obligation depends upon a certain contingency, and must be interpreted by the same rules of law as govern the construction of a bond with a condition affixed. The condition here is to pay if the judgment below should be affirmed above. The judgment was affirmed, the payment has not been made, and the condition is broken. The contingency no longer exists, the event upon which it depended has transpired, and a failure to perform the stipulation is the breach of the contract. Therefore the liability of the defendant has attached, and the agreement to pay has become absolute. And as the right of action on a bond or undertaking and an execution on the judgment are independent remedies, and the one is not a substitution for the other, and the creditor may pursue either or both at his election, (6 Gray, 141,) this action was properly commenced, and the court had jurisdiction of the case.

The judgment below is affirmed with costs.

D. S. WADE, *Chief Justice.*
HIRAM KNOWLES, *Asso. Justice.*
JOHN L. MURPHY, *Asso. Justice.*

Filed Aug. 19, 1872.

I. R. ALDEN, *Clerk.*

33 And thereupon the said defendant and appellant, Warren C. Gillette, by his said attorneys, gave notice of intention to appeal from said judgment of affirmance to the Supreme Court of the United States; and the court fixed the penalty of the undertaking on such appeal in the sum of seven thousand dollars, $7,000.00.

And afterwards, to wit, on the 24th day of August, A. D. 1872, the said appellant filed herein his undertaking on appeal from said judgment of affirmance to the Supreme Court of the United States, of which undertaking in words and figures the following is a copy, to wit:

Supreme Court of the United States.

WARREN C. GILLETTE, PLAINTIFF IN ERROR,
*vs.*
MASSENA BULLARD, DEFENDANT IN ERROR.

Know all men by these presents that we, Warren C. Gillette, James King, and Charles E. Duer, are held and firmly bound unto Massena Bullard, trustee, &c., in the full and just sum of seven thousand dollars, to be paid to the said obligees, their certain attorneys, executors, administrators, or assigns, to which payment, well and truly to be made,
34 we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents, sealed with our seals, and dated this 23rd day of August, A. D. 1872.

Whereas the above-named Warren C. Gillette hath presented a writ of error to the Supreme Court of the United States to reverse the judgment rendered by the supreme court of Montana Territory in the above case, wherein Massena Bullard, trustee, &c., is defendant, and the said Warren C. Gillette is plaintiff in error:

Now, therefore, the condition of this obligation is such that if the said Warren C. Gillette shall prosecute his said writ of error to effect, and answer all damages and costs if he shall fail to make good his plea, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

Sealed and delivered in the presence of—

W. C. GILLETTE. [SEAL.]
JAMES KING. [SEAL.]
CHAS. E. DUER. [SEAL.]

Approved by D. S. Wade, chief justice supreme court, Montana Territory.

Filed Aug. 24, 1872.

I. R. ALDEN, *Clerk.*

And on the same day, to wit, the 24th day of August, A. D. 1872, the said defendant and plaintiff in error filed herein his writ of error, the original of which is hereunto attached and made a part of this record, as follows, to wit:

35 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the supreme court of the Territory of Montana, in & for the district of Montana, greeting:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in the said supreme court before you between Messena Bullard, trustee, &c., and Warren C. Gillette, a manifest error hath happened, to the great damage of the said Warren C. Gillette, we, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be given therein, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the first Monday of December, A. D. 1872, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of
36 right and according to the laws and customs of the United States should be done.

Witness the honorable Salmon P. Chase, Chief Justice of the said Supreme Court, this fourth day of December, in the year of our Lord one thousand eight hundred and seventy-one.

ISAAC R. ALDEN,
*Clerk of the Supreme Court of the Territory of Montana.*

Allowed by—

D. S. WADE,
*Chief Justice of the Sup. Court of Montana T.*

WARREN C. GILLETTE, PL'FF IN ERROR,
*vs.*
MASSENA BULLARD, DEF'T IN ERROR. } Writ of error.

Filed Aug. 24, 1872.

I. R. ALDEN, *Clerk.*

37 And afterwards, to wit, on the 3rd day of September, A. D. 1872, the said defendant and plaintiff in error filed herein his citation, service of which being duly endorsed thereon, the same being hereunto attached, and as is as follows, to wit:

38 The United States of America, greeting, to Massena Bullard, trustee, &c.

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at Washington on the first Monday of December next, pursuant to a writ of error filed in the clerk's office of the supreme court of Montana Territory, wherein Warren C. Gillette is plaintiff in error and Massena Bullard, trustee, &c., is defendant in error, to show cause, if any there be, why the judgment rendered against the plaintiff in error as in the said writ of error mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable D. S. Wade, chief justice of the supreme

court of Montana Territory, this 27 day of August, in the year of our Lord one thousand eight hundred and seventy-two.

[SEAL.] D. S. WADE,
*Chief Justice of Sup. Court, Montana Territory.*

Service of copy acknowledged Aug. 30th, 1872.

W. F. SANDERS,
*Att'y for Def't in Error.*

(Indorsed:) Warren C. Gillette, pl'ff in error, vs. Massena Bullard, def't in error. Citation. Filed Sept'r 3, '72. I. R. Alden, clerk.

39 Supreme court of Montana Territory.

MASSENA BULLARD, TRUSTEE, &C.,
*vs.*
WARREN C. GILLETTE.

I, Isaac R. Alden, clerk of the supreme court of Montana Territory, do hereby certify the foregoing to be a full, true, and correct copy of the proceedings had and done in the above-entitled cause, as the same appears of record and on file in my office.

In testimony whereof I have hereunto see my hand and affixed the seal of said supreme court at Virginia City, in said Territory, this 1st day of October, A. D. 1872.

[SEAL.] ISAAC R. ALDEN, *Clerk.*

(Indorsement on cover:) No. 322. Warren C. Gillette, plaintiff in error, vs. Massena Bullard, trustee, &c. Montana Terr'y sup. court. Filed 4th December, 1872.

REC. 322—2

# Supreme Court of the United States.

OCTOBER TERM, 1874.

No. 49.

WARREN C. GILLETTE, PLAINTIFF IN ERROR,

*vs.*

MASSENA BULLARD, DEFENDANT IN ERROR.

**In Error to the Supreme Court of the Territory of Montana.**

## BRIEF FOR PLAINTIFF IN ERROR.

### STATEMENT OF THE CASE.

This is an action brought on the 30th day of January, 1872, in the District Court for the Third Judicial District of the Territory of Montana, by Massena Bullard, as trustee, against Warren C. Gillette, as one of the sureties on an appeal bond. The facts are substantially as follows:

On the 15th of June, 1868, one Charles W. Marden recovered a judgment in said Court, against George Plaistead and R. R. Wheelock. From this judgment, the defendants appealed to the Supreme Court of Montana, and executed an undertaking on appeal, with the said Warren C. Gillette, as one of the sureties. On the 31st of December, 1868, the judgment of the said District Court was affirmed by the Supreme Court of the Territory. Whereupon, the defendants took the case to the Supreme Court of the United States, "and executed and filed with the clerk of the Supreme Court of the said Territory, a good and sufficient bond in double the amount of the

judgment and costs in the action, and providing for the payment of all costs and damages in the said Supreme Court of the United States; and thereupon, the said Supreme Court of the said Territory, stayed all proceedings upon the said judgment in that Court rendered, and granted a supersedeas in said action."

On the 2d day of July, 1870, the said judgment was assigned in trust to the said Massena Bullard.

And this suit was instituted by Bullard, as trustee as aforesaid, on the undertaking first mentioned, against Gillette, one of the sureties thereon.—*Record*, 1, 2, 3.

The complaint alleges, among other things, the execution and delivery of the said undertaking on appeal, together with the conditions thereof, and the affirmance of the judgment by the Supreme Court of the Territory, and avers that the same remains in full force unreversed and unsatisfied, except as to a certain amount credited thereon. —*Record*, 1, 2.

The defendant. in his answer to the complaint, sets up as matter of defense, that the case had been taken to this Court, from the Supreme Court of the Territory; that a sufficient bond had been executed; that the said Supreme Court had stayed all proceedings upon the judgment, and granted a supersedeas in the action; that no remittitur or mandate had ever been issued from this Court to the Supreme Court of the Territory, nor from the said Supreme Court to the District Court in said case; and that the said judgment so rendered in the Supreme Court of the Territory, still remained in that Court so stayed by the order thereof, and by the supersedeas aforesaid.—*Record*, 3.

On the 25th of March, 1872, the plaintiff filed a motion for judgment, in the nature of a demurrer to the defendant's answer.—*Record*, 4.

And on the 30th of the same month, the Court sustained the plaintiff's motion, and rendered judgment in accordance therewith, against the defendant, for the sum of

$4,325.16, with interest and costs; to which ruling, the defendant excepted.—*Record*, 4, 5.

From this judgment, the defendant, on the 9th of April, 1872, appealed to the Supreme Court of the Territory, where the judgment below was affirmed.—*Recorder*, 5, 12, 13, 14.

The cause was, then, brought by writ of error, filed August 24, 1872, to this Court for review.—*Record*, 15, 16.

## Assignment of Error.

The Court below erred in sustaining the plaintiff's motion in the nature of a demurrer to the defendant's answer, and in rendering judgment against the defendant, upon the said undertaking on appeal in the said case of Marden *vs.* Plaistead and Wheelock, that case having been brought to this Court; the proceedings upon the judgment therein having been stayed and a supersedeas granted by the Supreme Court of the Territory of Montana; no remittitur or mandate having been issued, and the said judgment rendered in the said Supreme Court, still remaining therein stayed by the order thereof, and by the granting of a supersedeas.

## Brief of Argument.

The undertaking sued on in this case, was simply security for the judgment, and the plaintiff had no right to maintain an action thereon, until the final affirmance of the judgment in the Court of last resort. To enable him to maintain this action against the surety, it was necessary that he have a right to enter and collect a *judgment of affirmance* in the case.

Poppenhusen *vs.* Seeley, 41 *Barbour*, 450.

Robinson *vs.* Plimpton, 25 *New York*, 484.

This right, the plaintiff has never acquired, as shown by the pleadings.

It is true, that the defendant, in his answer to the com-

plaint, does not allege in express terms, that the said cause is still pending in this Court. But he avers that which is manifestly equivalent thereto, namely, that "no remittitur or mandate has ever been issued in the said action of Marden against Plaistead and Wheelock, from the said Supreme Court of the United States to the said Supreme Court of the said Territory; and that no remittitur or mandate from the said Supreme Court of the said Territory, has ever been issued to the District Court above named in said action; and that the said judgment so rendered in the said Supreme Court of the said Territory, still remains in that Court so stayed by the order thereof, by the giving of the said bond on appeal, and by the said supersedeas."

By the 9th section of the act of Congress organizing the Territory of Montana, approved May 26, 1864, (13 *Statutes*, 88, 89,) causes brought by writ of error or appeal to this Court, from the final decisions of the Supreme Court of that Territory, are placed on the same footing as those brought from the Circuit Courts of the United States. And the 24th section of the Judiciary act of September 24, 1789, (1 *Statutes*, 85,) provides that this Court "shall not issue execution in causes that are removed before them by writ of error, but shall send a *special mandate* to the Circuit Court to award execution thereupon."

In *Ex parte* Dubuque and Pacific Railroad, (1 *Wallace*, 73,) this Court said:

"The 24th section of the Judiciary act of 1789, governs the practice in cases brought up and reviewed in this Court. It is bound to give such judgment as the Court below ought to have given, and the law directs that a mandate shall be sent down to have the judgment entered as final in the lower Court," &c.

And see *Phillips' Practice*, Chap. XXIX, tilte *Mandate —Procedendo*.

The only proper evidence, therefore, of the final affirmance of the said judgment, is the mandate of this Court. And no such mandate has been "sent down to have the judgment entered as final in the lower Court," as appears by the pleadings set out in the record.

It is, therefore, submitted that the judgment of the Court below is clearly erroneous, and should be reversed.

The attention of the Court is respectfully directed to the argument of the learned conusel for the defendant in the Court below, to be found in the record, *pp.* 8 to 12.

ROBERT LEECH,

*Of Counsel for Plaintiff in Error.*